Supreme Court, U.S.
FILED
JAN 3 1994
OFFICE OF THE CLERK

No. 93-5209

In the Supreme Court of the United States

OCTOBER TERM, 1993

DARREN J. CUSTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his sentence under the Armed Career Criminal Act, 18 U.S.C. 924(e).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Summary of argument	9
Argument:	
I. The Armed Career Criminal Act does not permit a defendant, at sentencing, to challenge the validity of prior state court convictions used to enhance his sentence	12
II. The Constitution does not require that petitioner be allowed to attack the validity of the prior convictions that were used to enhance his sentence	16
A. A prior conviction may constitutionally be used for sentence enhancement unless its use would be arbitrary	17
B. An unrestricted right to collateral relief from prior convictions used for sentencing would undermine principles of finality	21
C. Repeat-offender schemes have traditionally allowed collateral attacks on prior convictions only on limited grounds	26
D. Petitioner's claims do not require the sentencing court to entertain a collateral attack on his prior convictions	29
1. The 1985 Maryland state court conviction	29
2. The 1989 Maryland state court conviction	31
Conclusion	35

TABLE OF AUTHORITIES

Cases: Page

Adams v. *Peterson*, 968 F.2d 835 (9th Cir. 1992), cert. denied, 113 S. Ct. 1818 (1993) 32
Arizona v. *Fulminante*, 499 U.S. 279 (1991) 20, 21
Berry v. *Mintzes*, 726 F.2d 1142 (6th Cir.), cert. denied, 467 U.S. 1245 (1984) 34
Boykin v. *Alabama*, 395 U.S. 238 (1969) 32, 33, 35
Brady v. *United States*, 397 U.S. 742 (1970) 33
Burgett v. *Texas*, 389 U.S. 109 (1967) 7, 20, 31
Castille v. *Peoples*, 489 U.S. 346 (1989) 22
Chapman v. *United States*, 111 S. Ct. 1919 (1991) .. 18, 19
Coleman v. *Thompson*, 111 S. Ct. 2546 (1991) 22
Dominguez v. *Henderson*, 447 F.2d 207 (5th Cir. 1971) 34
England v. *State*, 530 N.E.2d 100 (Ind. 1988) 28
Engle v. *Isaac*, 456 U.S. 107 (1982) 22, 25
Fairbanks v. *State*, 629 A.2d 63 (Md. 1993) 28
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 7, 34
Graham v. *West Virginia*, 224 U.S. 616 (1912) 17
Gryger v. *Burke*, 334 U.S. 728 (1948) 17
Halliday v. *United States*, 394 U.S. 831 (1969) 34
Henry v. *Mississippi*, 379 U.S. 443 (1965) 22
Hill v. *Lockhart*, 474 U.S. 52 (1985) 25, 30
Johnston v. *State*, 829 P.2d 1179 (Wyo. 1992) 28
Kelley v. *People*, 4 N.E. 644 (Ill. 1886) 27
Lacy v. *People*, 775 P.2d 1 (Colo.), cert. denied, 493 U.S. 944 (1989) 28
Lakomy v. *People*, 178 P. 571 (Colo. 1919) 27
Latney v. *United States*, 18 App. D.C. 265 (1901) ... 27
Lewis v. *United States*, 445 U.S. 55 (1980) 14, 15, 20
Linkletter v. *Walker*, 381 U.S. 618 (1965) 20, 34
Loper v. *Beto*, 405 U.S. 473 (1972) 23, 24
Mackey v. *United States*, 401 U.S. 667 (1971) 20
Mathis v. *Hocker*, 459 F.2d 988 (9th Cir. 1972) 34
McCarthy v. *United States*, 394 U.S. 459 (1969) 33
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 19
Medina v. *California*, 112 S. Ct. 2572 (1992) 26, 27

Cases—Continued: Page

Meller v. *Missouri*, 431 F.2d 120 (8th Cir. 1970), cert. denied, 400 U.S. 996 (1971) 34
Moore v. *Missouri*, 159 U.S. 673 (1895) 17-18
Oliphant v. *State*, 806 S.W.2d 215 (Tenn. Crim. App.), appeal denied (Tenn. Mar. 11, 1991) 28
Oyler v. *Boles*, 368 U.S. 448 (1962) 18
Parke v. *Raley*, 113 S. Ct. 517 (1992) 10, 11, 17, 18, 22, 23, 27, 29, 31, 32
People v. *McCullough*, 89 N.E.2d 335 (N.Y. 1949), cert. denied, 339 U.S. 924 (1950) 27
Plumbly v. *Commonwealth*, 43 Mass. (2 Met.) 413 (1841) 27
Spencer v. *Texas*, 385 U.S. 554 (1967) 17, 18, 29
State v. *Nowicki*, 474 N.W.2d 478 (Neb. 1991) 28
State v. *Webb*, 162 N.W. 358 (N.D. 1917) 27
State ex rel. Collins v. *Superior Court*, 754 P.2d 1346 (Ariz. 1988) 28
Strickland v. *Washington*, 466 U.S. 668 (1984) 6, 21-22, 30
Townsend v. *Burke*, 334 U.S. 736 (1948) 19
Tumey v. *Ohio*, 273 U.S. 510 (1927) 21
United States v. *Addonizio*, 442 U.S. 178 (1979) 25
United States v. *Dunnigan*, 113 S. Ct. 1111 (1993) 19
United States v. *Elliott*, 992 F.2d 853 (8th Cir. 1993), petition for cert. pending, No. 93-5570 28-29
United States v. *Frady*, 456 U.S. 152 (1982) 21
United States v. *Grayson*, 438 U.S. 41 (1978) 18
United States v. *Isaacs*, No. 92-2129 (1st Cir. June 22, 1993) 28
United States v. *Pereira*, 574 F.2d 103 (2d Cir.), cert. denied, 439 U.S. 847 (1978) 34
United States v. *Roman*, 989 F.2d 1117 (11th Cir. 1993), petition for cert. pending, No. 93-5464 28
United States v. *Timmreck*, 441 U.S. 780 (1979) 24, 25, 34, 35
United States v. *Tucker*, 404 U.S. 443 (1972) 7, 18, 20
United States v. *Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993) 28
Vincent v. *State*, 27 So.2d 556 (Miss. 1946) 27

Cases—Continued: Page

Watkins, Ex parte, 28 U.S. (3 Pet.) 193 (1830) 27
Wesley v. *Commonwealth*, 56 S.E.2d 362 (Va. 1949) 27
Williams v. *New York*, 337 U.S. 241 (1949) 18, 19
Wisconsin v. *Mitchell*, 113 S. Ct. 2194 (1993) 18

Constitution, statutes, rule and Sentencing Guidelines:

U.S. Const. Amend. V (Due Process Clause) 10, 16, 18, 23, 26, 29
Armed Career Criminal Act of 1984, Pub. L. No. 98-473, Tit. II, ch. XVIII, § 1802, 98 Stat. 2185 (presently codified at 18 U.S.C. 924(e)) 4, 9, 12
18 U.S.C. 924(e) 3, 4, 5, 6, 9, 12, 13, 23
18 U.S.C. 924(e)(1) 3, 4, 9, 12, 15
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976:
§ 212(a)(2), 98 Stat. 1987 14
§ 219(a), 98 Stat. 2027 14
Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236:
§ 409, 84 Stat. 1266-1269 14
21 U.S.C. 849 (1982) (repealed) 14
21 U.S.C. 849(c) (1982) (repealed) 14
§ 411(c), 84 Stat. 1270 13
21 U.S.C. 851(c) 13
Gun Control Act of 1968, 18 U.S.C. 921(a)(20) 2, 9, 13
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922:
§ 1001, 84 Stat. 948-950 (formerly codified at 18 U.S.C. 3575 (1982)) 14
§ 1001, 84 Stat. 949 (formerly codified at 18 U.S.C. 3575(e) (1982)) 14
18 U.S.C. App. 1202(a) (1982) (repealed) 15
18 U.S.C. App. 1202(a)(1) (1982) (repealed) 14

Statutes, rule and Sentencing Guidelines—Continued: Page

18 U.S.C. 922 12
18 U.S.C. 922(g) 2, 4, 12, 23
18 U.S.C. 922(g)(1) 2, 4, 12, 14, 15
18 U.S.C. 924 12
18 U.S.C. 924(a)(2) 3, 12
18 U.S.C. 924(c) 3
18 U.S.C. 3661 18
21 U.S.C. 841(a)(1) 3
21 U.S.C. 844 3
28 U.S.C. 2255 34
Fed. R. Crim. P. 11 ..... 33, 34
Sentencing Guidelines (Nov. 1, 1993):
§ 4A1.2 16
§ 4A1.2, Application Note 6 16

Miscellaneous:

12 *Cyclopedia of Law & Procedure: Criminal Law* (1904) 27
T. Cooley, *Constitutional Limitations* (1868) 27

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-5209

DARREN J. CUSTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 135-154) is reported at 988 F.2d 1355. The opinion of the district court (J.A. 124-134) is reported at 786 F. Supp. 533.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1993. A petition for rehearing was denied on April 30, 1993. J.A. 154-155. The petition for a writ of certiorari was filed on July 15, 1993, and was granted on October 12, 1993, limited to the first question presented in the petition. J.A. 156. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 921 provides in pertinent part as follows:

(a) As used in this chapter—

* * * * *

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. 922 provides in pertinent part as follows:

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce,

or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 924(a)(2) provides in pertinent part as follows:

Whoever knowingly violates subsection[ ] * * * (g) * * * of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. 924(e)(1) provides in pertinent part as follows:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of possessing cocaine, in violation of 21 U.S.C. 844,[1] and of

[1] Petitioner was charged with possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). J.A. 3. The jury found him guilty of the lesser included offense of simple possession. J.A. 117-118. The jury acquitted petitioner of using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). J.A. 118.

being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 235 months in prison, to be followed by three years of supervised release. J.A. 117-121.

1. At approximately 5 p.m. on July 1, 1991, two police officers approached an intersection known to be the site of extensive drug activity in Baltimore, Maryland. Several persons were standing on the corner in front of a convenience store. One of them called out a warning that officers were nearby. Petitioner fled into the store. 11/18/91 Tr. 83-85, 111-112.

As one of the officers followed petitioner into the store, he heard a loud "thump" in the area near the right wall, where petitioner was standing between two video machines. 11/18/91 Tr. 85-87, 120-121, 145-146. Petitioner tried to leave, but the officers stopped him. One of the officers searched the area near the right wall and found a loaded .38 caliber revolver on the floor between the two video machines. 11/18/91 Tr. 87-88, 92-94, 103-104. When petitioner was arrested, he dropped a small bag of cocaine. The officers found 18 similar bags of cocaine on the floor against the wall near one of the video machines. 11/18/91 Tr. 89-92, 94-96, 125-126; 11/19/91 Tr. 207-211. The next day, petitioner told a detective that the firearm belonged to him, and that he was an enforcer for a drug distribution ring. 11/19/91 Tr. 169-175.[2]

2. Prior to trial, the government filed a notice that it would seek an enhanced penalty under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). J.A. 6-7. Section 924(e)(1) prescribes a 15-year mandatory minimum prison term for any person who violates 18 U.S.C. 922(g)

[2] The parties stipulated at trial that prior to July 1, 1991, petitioner had been convicted in a court of a State or the United States of a crime punishable by imprisonment for a term exceeding one year. 11/19/91 Tr. 244-245.

and "has three previous convictions by any court referred to in [18 U.S.C.] 922(g)(1) * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." The notice charged that petitioner had three prior state felony convictions: (1) a 1985 Pennsylvania state court conviction for robbery; (2) a 1985 Maryland state court conviction for burglary; and (3) a 1989 Maryland state court conviction for attempted burglary. J.A. 6-7.

Petitioner challenged the use of his two Maryland convictions for sentence enhancement under Section 924(e). First, he argued that his 1985 burglary conviction had been obtained unconstitutionally because he had received ineffective assistance of counsel and had not entered a voluntary and intelligent guilty plea. Petitioner claimed that his attorney in that case had failed to advise him of the defense of voluntary intoxication. Petitioner contended that he would have gone to trial, rather than plead guilty, had he been aware of that defense. J.A. 57-58; 2/26/92 Pet. Dist. Ct. Mem. 1-8.

Petitioner challenged his 1989 conviction on the ground that it had been based upon a "stipulated facts" trial; that such a trial was in effect the same as a guilty plea; that he had not been adequately advised of the rights he was waiving by agreeing to a stipulated facts trial; and that his conviction was therefore fundamentally unfair. J.A. 59; 2/26/92 Pet. Dist. Ct. Mem. 8-11. Petitioner further argued that he had been denied effective assistance of counsel in that case because the stipulated facts established only attempted breaking and entering rather than attempted burglary under state law. J.A. 69-70.[3]

[3] Petitioner also challenged his 1989 conviction on the ground that it was not a "violent felony" conviction for purposes of Section 924(e). He argued that he should have been convicted of attempted breaking and entering and not attempted burglary. J.A. 60-68. The district court ruled that petitioner's 1989 Maryland conviction was a "violent felony" for

The district court refused to entertain petitioner's collateral attacks on his two Maryland convictions. In a letter ruling, the court initially determined that the performance of petitioner's attorney in the 1985 case did not fall below the level of professional competence required under *Strickland* v. *Washington*, 466 U.S. 668 (1984). 2/27/92 Order 1. The court found that it was not unreasonable for counsel to recommend a guilty plea in that case under the circumstances. *Id.* at 2.[4] In addition, the court rejected petitioner's claim that his 1989 "stipulated facts" trial was the functional equivalent of a guilty plea. *Id.* at 2-3.

Subsequently, the district court determined that it could not entertain petitioner's challenges to his prior convictions at all. The court noted that "[u]nlike the statutory scheme for enhancement of sentences in drug cases [21 U.S.C. 851], the [ACCA] provides no statutory right to challenge prior convictions relied upon by the Government for enhancement." J.A. 128. The court further concluded that the Constitution

purposes of Section 924(e) even if the conviction should have been for attempted breaking and entering. J.A. 68-69. While petitioner's appeal was pending, the state court entered an order deleting the references to "attempted burglary" and substituting "attempted breaking and entering." J.A. 152 n.3. The court of appeals held that "attempted breaking and entering 'presents a serious potential risk of physical injury to another' and thus constitutes a violent felony" for purposes of Section 924(e). J.A. 153. Petitioner sought review of that ruling in this Court, but the Court did not grant certiorari on that question.

[4] The court cited several considerations: "the intoxication defense is only partial; the burglary plea was part of a package that included a plea to an unrelated theft charge * * *; there was evidence negating the high degree of intoxication necessary to make out the defense of voluntary intoxication, *viz*, that [petitioner] stole only items of high value (antique statues) and secreted them in his mother's car; and the natural skepticism of a fact-finder towards a defense of voluntary intoxication, *soi-disant*." 2/27/92 Order 2.

bars the use of a prior conviction for sentence enhancement only when there was a complete denial of counsel in the prior proceeding. *Ibid.*, citing *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *United States* v. *Tucker*, 404 U.S. 443 (1972); and *Burgett* v. *Texas*, 389 U.S. 109 (1967). Because petitioner was represented by counsel in the two Maryland cases, the district court found no occasion to review the validity of his prior convictions in the sentencing proceedings. J.A. 131.

Based on petitioner's offense level of 33 and his criminal history category of VI, the district court determined that petitioner's sentencing range under the Sentencing Guidelines was 235-293 months in prison. The court then sentenced petitioner to 235 months in prison. J.A. 88, 93-94.[5]

3. The court of appeals affirmed. J.A. 135-154. The court noted that in *Burgett* and *Tucker*, this Court held that defendants may collaterally attack prior convictions used for sentencing purposes when the ground for challenging the prior convictions is that the defendant was denied counsel. Such claims, the court of appeals explained, are "different in kind from other constitutional errors" because the complete denial of counsel leaves the judicial system with "no assurance that the prior conviction reliably establishe[d] the defendant's guilt." J.A. 145. In addition, the court concluded that because such claims "will ordinarily lend themselves to facial review from * * * state court documents offered by the government to establish the conviction," the burden of adjudicating claims of complete deprivation of counsel "should * * * not be a heavy one." J.A. 146.

[5] After sentencing, the district court granted petitioner's motion for a new trial because the two police officers who were witnesses in this case had been indicted in state court for perjury in an unrelated case. J.A. 132-134. The court of appeals reversed, finding that the circumstances did not warrant departure from the general rule that subsequent discovery of impeachment evidence does not warrant a new trial. J.A. 140-144.

The court concluded that to accord a defendant a broad right to challenge prior convictions at sentencing would create significant practical impediments to the implementation of the sentence-enhancement scheme. The court explained, J.A. 146-147 (citations omitted):

> Even when the defendant's constitutional attack has no merit, establishing the validity of convictions that may be both geographically and tempora[lly] distant presents considerable practical difficulties. Many of the challenge[d] predicate convictions will be from state courts, and the procedures of those courts are likely to be unfamiliar to court and counsel. This unfamiliarity will be compounded by the fact that the attorneys of the state that convicted the defendant will not be there to defend that state's procedures. Moreover, the "inadequacy or unavailability of state court records and witnesses" from multiple or far-flung jurisdictions may further complicate the process.

The court added that "permitting collateral attacks on predicate state convictions in federal sentencing proceedings impairs the values both of comity and federalism." J.A. 147.

The court of appeals held that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." J.A. 149. Because petitioner's claims did not satisfy that standard, the court of appeals held that the sentencing court had properly declined to consider petitioner's challenges to his Maryland convictions. J.A. 149-151.

SUMMARY OF ARGUMENT

I. The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1), provides an enhanced sentence for any person who unlawfully possesses a firearm in violation of 18 U.S.C. 922(g) and "has three previous convictions by any court referred to in [18 U.S.C.] 922(g)(1) * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." By focusing on any person who "has three prior convictions," Section 924(e) looks to the fact of the previous convictions; it nowhere suggests that those convictions must be subject to scrutiny for potential constitutional errors before they may be counted. In fact, the definitional provision applicable to Section 924(e) provides that a court may not a count a conviction "which *has been* * * * set aside" (18 U.S.C. 921(a)(20) (emphasis added)), thereby suggesting that a court may rely on a prior conviction that *has not* been set aside. That conclusion is supported, moreover, by the fact that in other federal statutes, Congress explicitly stated when it intended to allow collateral attacks on prior convictions used for sentencing.

II. A. Statutes that enhance criminal penalties on the basis of prior convictions have a long tradition dating back to colonial times. As this Court has made clear, repeat-offender statutes do not impose additional punishment for the prior offenses, but merely provide a reasonable means of classifying persons as more serious offenders when they commit subsequent offenses after having been convicted previously. This Court has upheld such statutes against numerous constitutional challenges, and the validity of repeat-offender schemes is no longer open to serious question.

In designing those statutes, the States and the federal government have substantial freedom in prescribing punishments. This Court has made clear that a sentencing court may consider a broad range of factors relating to a defendant's crimi-

nal history, as long as the sentence is not based on an arbitrary distinction that violates the Due Process Clause. Thus, while Congress could insist that prior convictions be excluded from consideration for enhancement unless they are found to be wholly free from error, it should also be free to permit the use of prior convictions without regard to possible errors in the proceedings leading to those convictions, unless the errors are so grave that the resulting convictions necessarily lack reliability. Only with respect to a conviction of that sort is it arbitrary to impose a more severe sentence on a defendant based on a prior conviction.

B. A regime allowing defendants freely to challenge the validity of prior convictions used for sentencing would erode principles of finality important to our criminal justice system. As this Court explained last Term in *Parke* v. *Raley*, 113 S. Ct. 517 (1992), challenges to prior convictions used for sentence enhancement are collateral attacks on final judgments. The interests in the finality of prior judgments in that context are similar to but even stronger than in the case of collateral attacks on convictions through habeas corpus. In addition, a constitutional rule requiring courts to recognize a broad range of challenges to prior convictions would undermine the effectiveness of sentence-enhancement statutes. Prior convictions frequently involve closed cases and often come from other jurisdictions. While basic information about the convictions ordinarily can be found, record material such as transcripts and pleadings are often unavailable because, for example, the materials have been lost, or an appeal was never taken and the pertinent court sessions were therefore never transcribed.

The prohibition against challenges to prior convictions that are used for enhancement should be particularly strict in the case of convictions resulting from guilty pleas. This Court has emphasized that inroads on finality with respect to guilty

pleas are particularly problematic because the vast majority of convictions are entered pursuant to guilty pleas, and because a guilty plea is an especially reliable indicator of guilt. In addition, if a defendant is able to mount a collateral attack on a guilty plea after the sentence has been served, he may be able to retain the direct advantages of a plea bargain while avoiding the collateral consequences of the judgment to which he agreed.

C. Historical practice confirms that a defendant should be given only a narrow right to challenge the validity of previous convictions used for sentencing. As this Court recognized in *Parke* v. *Raley*, *supra*, for much of our history state courts did not allow recidivists to challenge prior convictions on the ground that they were erroneous, but limited such collateral attacks to the claim that prior convictions were void for lack of jurisdiction. Contemporary practice, moreover, discloses that there is no uniform state or federal approach to the question whether and to what extent a repeat offender should be entitled to challenge his prior convictions at sentencing. Thus, petitioner's claimed due process right has no foundation in history or practice.

D. A defendant should not be allowed to exclude his prior convictions for enhancement purposes by claiming that he received ineffective assistance of counsel in connection with a prior conviction or that he was not advised of the rights he was waiving by agreeing to a stipulated facts trial. Particularly where a prior guilty plea is concerned, Congress may rationally determine that a prior conviction may be used for sentencing without allowing the defendant to raise an ineffective-assistance-of-counsel claim that he could have but did not raise on direct appeal or in a collateral attack on the primary sentence. And the omission of an advisement of rights is not a constitutional error, much less a fundamental flaw that so undermines the reliability of a prior conviction that it

violates due process for a court to rely on that conviction for enhancement purposes in a later case.

ARGUMENT

I. THE ARMED CAREER CRIMINAL ACT DOES NOT PERMIT A DEFENDANT, AT SENTENCING, TO CHALLENGE THE VALIDITY OF PRIOR STATE COURT CONVICTIONS USED TO ENHANCE HIS SENTENCE

The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), establishes a sentence-enhancement scheme for those who violate 18 U.S.C. 922(g). Under Section 922(g), it is unlawful for any person to possess a firearm in interstate commerce if he falls into one of several enumerated categories, including persons "who ha[ve] been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1). The penalties for violating Section 922 are found in Section 924. Section 924(a)(2) provides that anyone who "knowingly violates" Section 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years or both." Section 924(e)(1) prescribes enhanced sentences (including a 15-year mandatory minimum prison term) for any person who violates Section 922(g) and "has three previous convictions by any court referred to in [18 U.S.C.] 922(g)(1) * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another."

Petitioner contends (Br. 16-24) that the ACCA should be construed to permit defendants to challenge the constitutionality of convictions used for sentencing under Section 924(e). The ACCA, however, does not authorize such collateral attacks. Section 924(e) applies whenever a defendant "has three previous convictions" of the specified character. Thus, the statute focuses on the fact of the previous convictions. Nothing in the statutory language suggests that, in addition,

prior final convictions must be subject to scrutiny for potential constitutional errors before they may be counted under Section 924(e).

Nor is there any basis for finding an implied right to challenge the constitutionality of prior convictions under the ACCA. The definitional provision of the Gun Control Act of 1968 (of which the ACCA is a part) makes clear that unchallenged prior convictions may be used for purposes of Section 924(e). In enumerating the circumstances in which a prior conviction may be counted for purposes of sentencing under the Gun Control Act, 18 U.S.C. 921(a)(20) states:

> What constitutes a conviction of * * * a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter [18 U.S.C. 921-930].

Thus, Congress specified that when a state conviction is used for enhancement, the existence of an appropriate "conviction" must be determined under the law of the rendering State. More importantly, the implication of the provision that a court may not count a conviction "which *has been* * * * set aside" is that courts may rely on a prior conviction that *has not* been set aside.

That conclusion is supported by Congress's enactment of other statutes that, by contrast to the ACCA, explicitly permit repeat offenders to challenge prior convictions that are used for enhancement purposes. For example, 21 U.S.C. 851(c), which was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 411(c), 84 Stat. 1270, sets forth specific procedures allowing a defendant to challenge the validity of a

prior conviction used to enhance the sentence for a federal drug offense. In addition, the enhancement provisions of the now-repealed dangerous special drug offender law, 21 U.S.C. 849 (1982), which was enacted as part of the same legislation (Pub. L. No. 91-513, § 409, 84 Stat. 1266), provided that "[a] conviction shown on direct or collateral review *or at the [sentencing] hearing* to be invalid * * * shall be disregarded." 21 U.S.C. 849(e) (1982) (emphasis added). See also Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001, 84 Stat. 949 (formerly codified at 18 U.S.C. 3575(e) (1982)). The fact that Congress did not include a similar qualification in the ACCA strongly suggests that it did not intend to give defendants the right to challenge the validity of prior convictions used for sentence enhancement under that statute.[6]

This Court's decision in *Lewis* v. *United States*, 445 U.S. 55 (1980), provides strong support for that analysis. *Lewis* involved 18 U.S.C. App. 1202(a)(1) (1982), one of the predecessors to the current version of 18 U.S.C. 922(g)(1). The Court held that a defendant could not challenge the validity of a predicate conviction under that statute. As the Court explained, the "plain meaning [of the term 'convicted'] is that the fact of a felony conviction imposes a firearms disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action." 445 U.S. at 60-61. The Court then added (*id.* at 62):

[6] Congress repealed 18 U.S.C. 3575 and 21 U.S.C. 849 in the same omnibus statute in which it enacted the ACCA. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 212(a)(2), 219(a), 98 Stat. 1987, 2027. If Congress had wished to establish a right of collateral review at sentencing under the ACCA, it could have included the same authorizing language in the ACCA that it had used in the statutes it was repealing.

> No exception, however, is made for a person whose outstanding felony conviction ultimately might turn out to be invalid for any reason. On its face, therefore, § 1202(a)(1) contains nothing by way of restrictive language. It thus stands in contrast with other federal statutes that explicitly permit a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony. See, *e.g.*, 18 U.S.C. § 3575(e) (dangerous special offender) and 21 U.S.C. § 851(c)(2) (recidivism under the Comprehensive Drug Abuse Prevention and Control Act of 1970).

The Court accordingly held that "the firearms prosecution does not open the predicate conviction to a new form of collateral attack." *Id.* at 67.

Congress's unqualified use of the term "previous convictions" in the ACCA, a successor to the statute that was construed in *Lewis*, should be construed in the same fashion: not to open the prior convictions to a new, and unspecified, form of collateral attack.[7] To construe the ACCA differently would lead to the anomalous result that the term "convicted" in Section 922(g)(1) would have a completely different meaning from the word "convictions" in Section 924(e)(1), with

[7] Petitioner argues (Br. 18-20) that when Congress enacted the ACCA in 1984, it did so against a legal background that assumed the general availability of collateral attacks on the constitutionality of prior convictions. Congress enacted the ACCA in 1984 as an amendment to former 18 U.S.C. App. 1202(a). *Lewis* had by then established the principle that Congress speaks explicitly when it intends to authorize collateral attacks on predicate convictions used in a federal statutory scheme, and *Lewis* had decided that question in construing the very statute to which Congress attached the ACCA. Thus, to the extent that Congress enacted the ACCA against a background interpretive principle, that principle was that the term "convictions" should not be interpreted to mean "convictions that would not have been subject to legal challenge on direct appeal."

no textual suggestion that the term should be construed differently in the two companion provisions.[8]

II. THE CONSTITUTION DOES NOT REQUIRE THAT PETITIONER BE ALLOWED TO ATTACK THE VALIDITY OF THE PRIOR CONVICTIONS THAT WERE USED TO ENHANCE HIS SENTENCE

Petitioner argues that even if the ACCA does not authorize him to challenge the validity of the prior convictions used to enhance his sentence, the Constitution requires that he be permitted to do so. We submit that nothing in the Constitution requires a State or the federal government to afford a defendant a broad right to challenge the validity of prior convictions before they can be used for sentence enhancement. Only if the prior convictions were obtained without the basic elements necessary to a reliable judgment does the Due Process Clause bar the government from using the simple fact of conviction as a basis for sentence enhancement. Thus, as the court of appeals held, collateral review of a prior conviction in a sentencing proceeding is permitted

[8] Petitioner notes (Br. 14 n.8) that several courts of appeals allow consideration of the constitutionality of previous convictions when they are used to determine a defendant's sentence under the Sentencing Guidelines. Those cases, however, are based on the commentary to Sentencing Guidelines § 4A1.2 or the Constitution. They are therefore inapposite to the statutory question discussed above. In any case, the Sentencing Commission has recently amended the commentary to Section 4A1.2 to state that "this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions)." Guidelines § 4A1.2, Application Note 6 (Nov. 1, 1993). It is therefore clear that in future cases the Guidelines will not provide an independent basis for collateral attacks on prior convictions used for sentence enhancement.

only in the case of a grave structural error in the prior adjudication, such as a complete denial of the right to counsel, that renders the previous conviction inherently unreliable.

A. A Prior Conviction May Constitutionally Be Used For Sentence Enhancement Unless Its Use Would Be Arbitrary

One of the most familiar features of criminal sentencing is that repeat offenders are punished more severely than first-time offenders. "Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times." *Parke* v. *Raley*, 113 S. Ct. 517, 521 (1992).

> The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. * * * Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many States.

Graham v. *West Virginia*, 224 U.S. 616, 623 (1912). Repeat-offender statutes and other sentence-enhancement schemes based on the offender's criminal background have now been enacted "in all the States, and by the Federal Government." *Spencer* v. *Texas*, 385 U.S. 554, 559 (1967) (footnote omitted). See also *Parke* v. *Raley*, 113 S. Ct. at 521-522.

Repeat-offender statutes do not impose additional punishment for the commission of the prior crimes. Rather, the enhanced punishment is properly understood as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948). Thus, the existence of a prior conviction merely affords a sentencing court "a reasonable basis for classification" of more serious offenders. *Graham* v. *West Virginia*, 224 U.S. at 630. See also *Moore* v. *Mis-*

souri, 159 U.S. 673, 678 (1895) ("the State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offences than for a first offence against the law"). The constitutionality of such statutes, and of the general principle of imposing stiffer punishments upon repeat offenders, "is no longer open to serious challenge." *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962).[9]

The freedom enjoyed by States and the federal government in using criminal history as a sentencing consideration is an application of the familiar principle that a sentencing court may consider a broad range of factors in determining the appropriate sentence without running afoul of the Due Process Clause. See, *e.g.*, *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993); *Chapman* v. *United States*, 111 S. Ct. 1919, 1927 (1991); *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); *Williams* v. *New York*, 337 U.S. 241, 246-247 (1949). A sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); see 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). The only substantive limitation on the factors that a court may consider in sentencing is that the factors must not be arbitrary in

[9] This Court has sustained repeat-offender statutes "against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." *Parke* v. *Raley*, 113 S. Ct. at 522, quoting *Spencer* v. *Texas*, 385 U.S. at 560.

relation to the goals of sentencing. See *Chapman* v. *United States*, 111 S. Ct. at 1927.

In light of those principles, a legislature seeking to enhance sentences based on past misconduct is not limited to prior convictions that the sentencing court certifies as valid. For example, a defendant's sentence may be enhanced based on prior criminal conduct for which he was never charged. See *Williams* v. *New York*, 337 U.S. at 244 (uncharged burglaries); *United States* v. *Dunnigan*, 113 S. Ct. 1111, 1118 (1993) (holding that a defendant's sentence may be enhanced if a court finds that he has committed perjury at trial, without the need for a separate perjury conviction). And a defendant may also be sentenced more severely based on findings of misconduct made by a court under the preponderance of the evidence standard, not by a jury beyond a reasonable doubt. See *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91 (1986).

If a legislature may provide for sentence enhancement based on indicators of past misconduct falling short of what would be needed for a criminal conviction, it may rationally treat a prior conviction as a relevant sentencing factor without allowing a defendant to challenge that conviction based on any claim of error that would have been enough to call for reversal of the conviction on direct appeal. As in the case of other sentencing factors, the use of a prior conviction for enhancement is permissible as long as the use of the conviction is not arbitrary, either because it conveys a false picture of the defendant's criminal past, or because for some other reason it is inherently unreliable as an indicator of criminal history.

A prior conviction conveys a false picture of the defendant's past if, for example, the information about the defendant's prior convictions is "extensively and materially false." *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948) (due process violated when defendant sentenced based on "assumptions concerning his criminal record which were materially un-

true"). A prior conviction is also unreliable as an indicator of criminal history if the conviction is void for all purposes because of a fundamental structural defect in the proceedings leading to the conviction.

The principal example of an unreliable prior conviction is an uncounseled felony conviction, which this Court has held may not be used for enhancement purposes. See *Burgett* v. *Texas*, 389 U.S. 109 (1967); *United States* v. *Tucker*, *supra*. Contrary to petitioner's argument (Br. 12-13), however, *Burgett* and *Tucker* do not stand for the proposition that a defendant may mount a collateral attack on the validity of a prior conviction on any basis whenever such a conviction is used for sentence enhancement in a later proceeding. The sentences in *Burgett* and *Tucker* were upset because they "depended upon the reliability of a past uncounseled conviction." *Lewis* v. *United States*, 445 U.S. at 67. The complete denial of counsel in a felony case implicates "the very integrity of the fact-finding process." *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965); accord *Mackey* v. *United States*, 401 U.S. 667, 693-694 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). As this Court has explained, total deprivation of the right to counsel is a "structural defect[ ] in the constitution of the trial mechanism," and "[t]he entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant." *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991). Because an uncounseled felony conviction so profoundly undermines confidence in the reliability of a criminal judgment, the Court has regarded the use of such a conviction for enhancement purposes as offending principles of due process.

The Court has never identified any other error as sufficient to disqualify a prior conviction from being considered in a sentence-enhancement proceeding. By analogy to the denial

of counsel, however, a defendant should be permitted to challenge prior convictions when he can point to a fundamental error that results in a "structural defect affecting the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. at 310.[10] Where that kind of error is present, a defendant has been denied the "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Ibid.* And where a prior conviction is infected by a structural error that has effectively denied the defendant the basic elements of a trial, it is reasonable to conclude—by extension of the principles of *Burgett* and *Tucker*—that it would violate due process to use such a conviction for enhancement purposes.[11]

B. An Unrestricted Right To Collateral Relief From Prior Convictions Used For Sentencing Would Undermine Principles Of Finality

A defendant who contests a final judgment of conviction in a subsequent proceeding confronts the principle that when a defendant's "chance to appeal has been waived or exhausted, * * * [a court is] entitled to presume he stands fairly and finally convicted." *United States* v. *Frady*, 456 U.S. 152, 164 (1982). See also *Strickland* v. *Washington*, 466 U.S. 668,

---

[10] In addition to the total denial of the right to counsel, this Court in *Fulminante* cited the denial of a trial before an impartial judge (see *Tumey* v. *Ohio*, 273 U.S. 510 (1927)) as constituting such an error. See 499 U.S. at 309-310.

[11] This analysis is entirely consistent with the Fourth Circuit's. That court held that a defendant may mount a collateral attack upon a prior conviction when he asserts a claim having the following two characteristics: (1) "prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case"; and (2) "the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." J.A. 149.

697 (1984) ("the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment"). The presumption attaches, moreover, "even when a collateral attack on a final conviction rests on constitutional grounds." *Parke* v. *Raley*, 113 S. Ct. at 524.

As this Court recognized in *Parke* v. *Raley*, 113 S. Ct. at 523-524, principles of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing. When a defendant challenges a prior conviction used for sentencing, he is in effect mounting a collateral attack on that judgment. He is asking a federal court "to deprive the[ ] [state court judgment] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgment[ ]." *Id.* at 523.

At a minimum, that means that when the defendant seeks to overturn the prior state court judgment on federal constitutional grounds, his right to do so should be no greater than the right that a state prisoner enjoys when he seeks to challenge his incarceration on constitutional grounds in federal court. A defendant convicted in state court usually may challenge his conviction on direct appeal, as well as in habeas corpus proceedings in state and federal court. If that prisoner has not exhausted his state remedies or has committed a procedural default under state law, a federal court, on direct or collateral review, may decline to hear his claims even though he alleges that his conviction violates the federal Constitution. See, *e.g.*, *Coleman* v. *Thompson*, 111 S. Ct. 2546 (1991); *Castille* v. *Peoples*, 489 U.S. 346 (1989); *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Henry* v. *Mississippi*, 379 U.S. 443 (1965). At some point, a state court judgment becomes final and is no longer open to challenge on grounds that the defendant has not preserved.

If a defendant, by his conduct, can forfeit his right to bring a federal habeas corpus action challenging the primary effect

of his state court judgment—the execution of that judgment against him—it is anomalous to suggest that he is nonetheless perpetually free to challenge the collateral effects of that judgment when it is used by a federal court in sentencing. Not only has Congress failed to give the federal court any authority to issue the latter form of collateral relief, but the relief in question involves collateral consequences of the prior conviction that are entirely within the defendant's control. If a defendant has three prior convictions that qualify under 18 U.S.C. 924(e), he may avoid the relevant collateral consequences of those convictions by refraining from violating 18 U.S.C. 922(g). In light of those considerations, there is no reason to interpret the Due Process Clause to disregard any considerations of finality when the defendant seeks to challenge the effects of a state court conviction in a sentencing proceeding in federal court.

In fact, there are good reasons to give the presumption of regularity and finality even greater weight when a collateral attack occurs in the context of sentence enhancement. If a defendant is entitled in that context to challenge a prior, final conviction on grounds that require substantial judicial inquiry, it seriously undermines the objectives of repeat-offender schemes. Prior convictions offered for enhancement purposes will in many instances be from "another era from other States." *Loper* v. *Beto*, 405 U.S. 473, 500 (1972) (Rehnquist, J., dissenting). The remoteness of prior convictions may present insuperable obstacles to the prosecutor's successfully defending against even nonmeritorious collateral attacks. See *Parke* v. *Raley*, 113 S. Ct. at 524-525. "The States that rendered the convictions [will not be] parties to the [subsequent] * * * proceeding, and, of course, have no interest whatever in sustaining the validity of sentences long since served." *Loper* v. *Beto*, 405 U.S. at 500 (Rehnquist, J., dissenting).

Moreover, the court and counsel in the subsequent proceeding cannot "be expected to have any familiarity with the vagaries of criminal procedure" in the original rendering States. *Loper* v. *Beto*, 405 U.S. at 500 (Rehnquist, J., dissenting). The prior convictions may be decades old, and any surviving witnesses may well be "sufficiently distant from the location of the [later proceeding] as to render their voluntary appearance unlikely, and their compulsion by process impossible." *Ibid.* Finally, because the defendant may not have taken an appeal from the judgment against him and therefore may never have ordered a transcript of the proceedings leading to the previous conviction, the record of the previous case may be difficult or impossible to reconstruct. In such instances, a rule permitting a variety of challenges to a prior conviction would have the incongruous effect of making the least contested convictions the ones that would be hardest for the government to qualify for use in sentence-enhancement proceedings.[12]

These principles are especially applicable in cases in which the prior convictions are based on guilty pleas, because when a guilty plea is at issue, "the concern with finality * * * has special force." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (footnote omitted). As the Court has explained,

[12] Petitioner suggests (Br. 38-41) that attacks on prior convictions could be efficiently resolved by placing the burden of proof on the defendant. While that approach would provide some degree of protection from abusive and burdensome collateral attacks, that safeguard is not sufficient. If a broad array of errors is cognizable in a sentence-enhancement proceeding, it will be much easier for a defendant to assert a claim of error (by simply testifying to the omission of some procedural requirement) than for the government to find evidence to rebut it. Given the often serious consequences of sentence enhancement, defendants will have strong incentives to testify to some procedural irregularity in the prior case.

"[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly administration of justice. *United States* v. *Addonizio*, 442 U.S. 178, 184 n.11 (1979). See also *Engle* v. *Isaac*, 456 U.S. at 127-128. The impact is greatest "when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas * * * [and because] the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *United States* v. *Timmreck*, 441 U.S. at 784. See also *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985).

Permitting a defendant to challenge a previous guilty plea conviction in a sentence-enhancement proceeding would be inequitable in many cases, particularly where the guilty plea was the product of plea bargaining. A defendant who has never had his underlying conviction set aside has obtained the advantages he bargained for as part of any plea agreement. He should not be allowed to retain those advantages while preventing the plea from being used to his disadvantage in a later sentencing proceeding. If such a defendant is permitted to mount a collateral attack on his prior conviction, the consequence is that the defendant's good deal becomes even better, while the State is not even given the theoretical opportunity of retrying him on the original charges, which it would have had if he had challenged his plea through habeas corpus.

Petitioner does not suggest any limit on the scope of the constitutional right he asserts to challenge prior convictions in sentencing proceedings. Since his position is that any conviction that is subject to invalidation may be challenged in a subsequent sentencing proceeding, his position would appear to require federal courts to consider any challenge that the

defendant cares to raise, regardless of whether it has ever been raised in the state courts, and even if it has been rejected by the state courts. In particular, to the extent that petitioner's constitutional argument turns on the question of the validity of the previous conviction, the logical consequence of his argument would appear to be that federal courts would be required to consider even state law challenges to prior state court convictions that are offered for use in federal sentencing proceedings. Such an expansive right of collateral attack on prior state court convictions would force federal courts to assume an exceptionally broad role in correcting both state and federal law errors committed by state courts in the course of reaching judgments that have already become final. It is difficult, to say the least, to find that the simple terms of the Due Process Clause require that result.

C. Repeat-Offender Schemes Have Traditionally Allowed Collateral Attacks On Prior Convictions Only On Limited Grounds

On the question whether due process compels sentencing courts to conduct plenary review of prior convictions used for sentence enhancement, the historical practice is instructive. See *Medina* v. *California*, 112 S. Ct. 2572, 2577 (1992) (finding past practice "probative" of whether a claimed procedural right is protected by the Due Process Clause on the ground that it is "so rooted in the traditions and conscience of our people as to be ranked as fundamental").

That practice provides no support for petitioner's assertion of a broad right to challenge the validity of prior convictions at sentencing. As this Court recognized last Term, "[f]or much of our history, it appears that state courts altogether prohibited defendants in recidivism proceedings from challenging prior convictions as erroneous, as opposed to void

for lack of jurisdiction." *Parke* v. *Raley*, 113 S. Ct. at 525.[13] Under the traditional approach, "the issue as to the first conviction [was] not whether appellant was therein properly convicted but whether as an affirmative matter he was finally convicted." *Vincent* v. *State*, 27 So.2d 556, 557 (Miss. 1946). In light of the traditional approach, the standard adopted by the Fourth Circuit—which allows courts to examine prior convictions for fundamental errors that render those convictions inherently unreliable—easily passes constitutional muster.

In addition, while contemporary legal practice is "of limited relevance to the due process inquiry" (*Medina* v. *California*, 112 S. Ct. at 2578), current practice also fails to establish the broad right of collateral review that petitioner claims. It is true that "[i]n recent years state courts have permitted various challenges to prior convictions" during repeat-offender proceedings. *Parke* v. *Raley*, 113 S. Ct. at 525. However, there is no uniform practice among the States regarding the circumstances in which such challenges must be allowed, and many of the state standards are consistent

---

[13] See, *e.g.*, *Plumbly* v. *Commonwealth*, 43 Mass. (2 Met.) 413, 413 (1841) (Shaw, C.J.); *Kelley* v. *People*, 4 N.E. 644, 645-646 (Ill. 1886); *Latney* v. *United States*, 18 App. D.C. 265, 273-274 (1901); *State* v. *Webb*, 162 N.W. 358, 361 (N.D. 1917); *Lakomy* v. *People*, 178 P. 571, 572 (Colo. 1919); *Wesley* v. *Commonwealth*, 56 S.E.2d 362, 364 (Va. 1949); *People* v. *McCullough*, 89 N.E.2d 335, 337 (N.Y. 1949), cert. denied, 339 U.S. 924 (1950). See also 12 *Cyclopedia of Law & Procedure: Criminal Law* § 18, at 950 (1904). That principle, of course, reflects the more general rule that the judgment of a court of competent jurisdiction must be given effect unless it is set aside by the rendering court. See, *e.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-203 (1830) (Marshall, C.J.); T. Cooley, *Constitutional Limitations* 408-409 (1868).

with that of the Fourth Circuit in this case.[14] The federal courts of appeals, moreover, have also failed to adopt a uniform view.[15] The lack of any settled approach to the ques-

[14] For examples of the various standards, see, *e.g.*, *Fairbanks* v. *State*, 629 A.2d 63, 68 (Md. 1993) ("the defendant has no constitutional right to mount a collateral attack against a facially valid predicate conviction at the sentencing proceeding"); *Johnston* v. *State*, 829 P.2d 1179, 1181 (Wyo. 1992) ("defendant mounting a constitutional challenge to an underlying conviction * * * must make a prima facie showing that one or more of his underlying convictions was [unconstitutional]"); *Oliphant* v. *State*, 806 S.W.2d 215, 217 n.2 (Tenn. Crim. App.) ("a *facially* invalid judgment of conviction may not be used to enhance punishment"), appeal denied (Tenn. Mar. 11, 1991); *State* v. *Nowicki*, 474 N.W.2d 478, 483 (Neb. 1991) (defendant may not collaterally attack a prior conviction "beyond the issue of whether the defendant had counsel or waived the right to counsel"); *Lacy* v. *People*, 775 P.2d 1, 6 (Colo.) (en banc) ("A defendant attacking the constitutionality of a prior conviction in habitual criminal proceedings must make a prima facie showing that the guilty plea was unconstitutionally obtained."), cert. denied, 493 U.S. 944 (1989); *State ex rel. Collins* v. *Superior Court*, 754 P.2d 1346, 1351 (Ariz. 1988) (en banc) ("Where the record shows a defendant was previously convicted while represented by counsel, he may not collaterally attack the validity of that conviction when it is alleged for enhancement purposes."); *England* v. *State*, 530 N.E.2d 100, 103 (Ind. 1988) ("the accused may challenge the predicate felony conviction * * * when (1) the court records reflecting the proceeding which led to the prior conviction, on their face, raise a presumption that the conviction is constitutionally infirm, and (2) the apparent constitutional infirmity is of the type which undermines both the integrity and reliability of the determination of guilt").

[15] The federal courts have taken a variety of positions on the right to challenge prior convictions used for sentence enhancement. Compare, *e.g.*, *United States* v. *Vea-Gonzales*, 999 F.2d 1326, 1333 (9th Cir. 1993) (Constitution requires sentencing courts generally to hear collateral attacks on prior convictions used for sentencing) with *United States* v. *Roman*, 989 F.2d 1117, 1120 (11th Cir. 1993) (en banc) (per curiam) (courts must entertain challenges only if prior conviction is "presumptively void"), petition for cert. pending, No. 93-5464; *United States* v. *Isaacs*, No. 92-2129 (1st Cir. June 22, 1993), slip op. 15-16 (same); and *United States* v. *Elliott*, 992 F.2d 853, 857 (8th Cir. 1993) (courts must

tion presented in this case undercuts petitioner's contention that the Due Process Clause guarantees him a broad right to challenge his prior convictions at sentencing. Cf. *Parke* v. *Raley*, 113 S. Ct. at 525 (the "range of contemporary state practice" undermines claim that a particular state practice is fundamentally unfair); *Spencer* v. *Texas*, 385 U.S. at 566 (tolerance for "a spectrum of state procedures dealing with [repeat offenders] is especially appropriate" in light of the diversity of state practices).

D. Petitioner's Claims Do Not Require The Sentencing Court To Entertain A Collateral Attack On His Prior Convictions

Petitioner seeks to challenge his 1985 Maryland state court burglary conviction on the ground that his attorney did not render effective assistance in connection with his guilty plea. In particular, petitioner argues that his counsel in the 1985 case did not advise him of the potential defense of voluntary intoxication. Petitioner seeks to challenge his 1989 Maryland state court conviction on the ground that he was not advised of the rights he was waiving by agreeing to a "stipulated facts" trial. Neither claim alleges a fundamental structural defect in the prior conviction; petitioner's sentence accordingly was not based on inherently unreliable adjudications the use of which denied him due process.

1. *The 1985 Maryland State Court Conviction*

With respect to his 1985 conviction, petitioner claims that his lawyer rendered ineffective assistance in advising him about whether to plead guilty. That claim does not go to a structural flaw in the proceedings against petitioner that would

hear challenges to prior convictions only if the alleged constitutional infirmity undermines a conviction's reliability as an indicator of guilt or "erodes the principle" of the case relied on for the underlying claim of error), petition for cert. pending, No. 93-5570.

render the resulting judgment inherently unreliable. To be sure, an ineffective-assistance-of-counsel claim bears on the question whether the defendant has received a fair trial. But that question is quite distinct from the question whether the alleged error so undermines the reliability of the conviction that Congress may not treat a prior, final state court conviction as a rational sentencing factor without giving a defendant the right to litigate the claim, even though the claim was not previously raised on appeal or in independent collateral proceedings challenging the prior conviction.

This Court has explained that "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Strickland* v. *Washington*, 466 U.S. at 693. Where a guilty plea is involved, the interest in finality is greater, and "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised." *Hill* v. *Lockhart*, 474 U.S. at 58. A defendant challenging his guilty plea accordingly must establish not only constitutionally ineffective lawyering, but also "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.[16] That is an inquiry that lends itself to manipulation by defendants who have nothing to lose by claiming that their attorney failed to advise them of a particular fact and that they would not have pleaded guilty with full information.

In sum, claims of ineffective assistance of counsel may rise to the level of reversible error, but they do not render a prior

[16] This, in turn, will frequently require a prediction about the effect an attorney error might have had upon the trial. For example, where an attorney fails to advise his client of a possible defense, the prejudice inquiry "depend[s] largely on whether the affirmative defense likely would have succeeded at trial." *Hill* v. *Lockhart*, 474 U.S. at 59.

conviction "presumptively void," *Burgett* v. *Texas*, 389 U.S. at 115, as is true in the case of a complete denial of counsel. Not only are ineffective-assistance-of-counsel claims highly fact-intensive,[17] but they often simply mirror claims of trial error that were not preserved for review. There is therefore no reason to conclude that such claims are equivalent to the complete deprivation of counsel. In light of the strong presumption of finality that attaches to a conviction entered pursuant to a guilty plea, the very heavy burden on a defendant seeking to overturn such a conviction, and the infrequency with which claims of ineffective assistance of counsel are found to have merit, Congress may rationally treat a prior final conviction as a pertinent sentencing factor without first allowing the defendant to litigate any ineffective-assistance-of-counsel claim that he could have but did not raise on direct appeal or in a separate collateral proceeding.

2. *The 1989 Maryland State Court Conviction*

Petitioner claims that his 1989 conviction was invalid because it resulted from a "stipulated facts" trial, and because he was not advised of the rights he was waiving by agreeing

[17] Petitioner argues (Br. 32-33) that it is not possible to evaluate the total denial of the right to counsel from the face of a conviction. According to petitioner, a *Gideon* claim is inherently fact-intensive, because it will always involve the question of waiver. In *Burgett*, however, the state court record indicated that the defendant had not had counsel in the prior case, which was decided prior to *Gideon*. Thus, "it was reasonable to presume that the defendant had not waived a right he did not possess." *Parke* v. *Raley*, 113 S. Ct. at 524. And in most instances, the inquiry into representation will not be difficult to conduct: most felony defendants are represented, and in those cases in which representation is waived, courts typically are careful to ensure that a record of the waiver is made and preserved.

to that procedure.[18] That claim is based on this Court's decision in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), which requires state courts to place on the record facts showing that a defendant who pleads guilty is aware of the rights he is waiving by entering that plea. Even assuming that a stipulated facts trial is the functional equivalent of a guilty plea (but see *Adams* v. *Peterson*, 968 F.2d 835, 839-842 (9th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1818 (1993)), an alleged violation of the prophylactic requirements of *Boykin* does not rise to the level of fundamental structural error equivalent to the deprivation-of-counsel claims in *Burgett* and *Tucker*.

First, in *Parke* v. *Raley*, 113 S. Ct. at 523, this Court held that *Boykin*'s prophylactic protections do not extend to collateral attacks on final convictions. The procedures set forth in *Boykin* are not themselves constitutional requirements, much less essential components of a criminal trial without which the trial cannot serve as a reliable device for resolving guilt or innocence. Instead, the requirements of *Boykin* are merely prophylactic rules designed to safeguard certain rights that are implicated when a defendant enters a guilty plea. Thus, a *Boykin* error, even if one occurred in this case, would

[18] Petitioner also claimed that he was denied effective assistance of counsel in connection with the 1989 conviction, because he was convicted of attempted burglary rather than attempted breaking and entering. For the reasons discussed with respect to petitioner's 1985 state court conviction, a claim of ineffective assistance of counsel should not be available when a defendant raises it for the first time when a prior conviction is used for sentencing. In any event, it is difficult to see how that alleged error has made any difference here, since the state court has corrected its judgment in that regard, and since both the district court and the court of appeals held that petitioner was subject to sentencing under the ACCA regardless of whether his state conviction was for attempted burglary or attempted breaking and entering.

not justify a collateral challenge to the use of the 1989 conviction for enhancement purposes.

Second, this Court's decisions under Fed. R. Crim. P. 11, which governs plea proceedings in the federal courts, indicate that *Boykin* claims should not be cognizable in a collateral attack such as the one at issue in this case. As *Boykin* does for state court judges, Rule 11 requires federal judges to address defendants who wish to plead guilty, in order to ensure that the defendants understand the nature and consequences of their pleas. The purpose of Rule 11 is the same as the purpose that underlies *Boykin*'s "on-the-record advisement" requirement for guilty pleas. See *Brady* v. *United States*, 397 U.S. 742, 749 n.6 (1970); *Boykin* v. *Alabama*, 395 U.S. at 246-247 (Harlan, J., dissenting). Because a defendant's guilty plea waives "his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers," Rule 11 seeks to ensure that his plea is truly voluntary and to create an adequate record for any post-conviction challenge. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). In *McCarthy*, which was decided just two months before *Boykin*, this Court enforced the prophylactic requirements of Rule 11 by reversing a conviction on direct review because the district judge had not inquired into the defendant's understanding of the charges, as required by Rule 11. 394 U.S. at 472.

The Court subsequently made clear that Rule 11 violations, although they implicate the process by which the voluntariness of a guilty plea is assured, do not call into question the fundamental fairness of the underlying conviction.[19] In contrast with its treatment of cases involving the

[19] Indeed, the Court in *McCarthy* made explicit that it was not resting its decision on constitutional grounds, and it emphasized that Rule 11 had not been held to be constitutionally required. 394 U.S. at 464-465.

right to counsel under *Gideon* v. *Wainwright, supra,* the Court gave *McCarthy* only prospective application. See *Halliday* v. *United States,* 394 U.S. 831 (1969) (per curiam).[20] Although this Court has never spoken to the issue, the courts of appeals have likewise declined to apply *Boykin* retroactively.[21] This is strong evidence that violations of the prophylactic rules of *Boykin* and Rule 11 are not the kind of errors that inherently undercut the reliability of guilty pleas. Cf. *Linkletter* v. *Walker,* 381 U.S. at 639 ("in each of the three areas in which we have applied our rule retrospectively, the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process") (footnote omitted).

Finally, in *United States* v. *Timmreck, supra,* the Court held that a violation of Rule 11's prophylactic requirements, without more, is not cognizable on collateral review. The defendant in *Timmreck* asserted that a Rule 11 violation had occurred because the district court accepted his plea without informing him of a mandatory special parole term. In holding that the defendant's claim was not cognizable under 28 U.S.C. 2255, the Court explained that a formal violation of Rule 11 "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." 441 U.S.

[20] The Court explained that although strict compliance with Rule 11 gave greater assurance that the plea was voluntary, the issue of voluntariness could be raised independently of Rule 11. *Halliday* v. *United States,* 394 U.S. at 832-833. Hence, the retroactivity of *McCarthy* was not essential to make certain that a guilty plea was in fact voluntary.

[21] See, *e.g., Berry* v. *Mintzes,* 726 F.2d 1142, 1146 (6th Cir.), cert. denied, 467 U.S. 1245 (1984); *United States* v. *Pereira,* 574 F.2d 103, 105 n.5 (2d Cir.), cert. denied, 439 U.S. 847 (1978); *Mathis* v. *Hocker,* 459 F.2d 988, 989 (9th Cir. 1972); *Dominguez* v. *Henderson,* 447 F.2d 207, 209 (5th Cir. 1971) (citing cases); *Meller* v. *Missouri,* 431 F.2d 120, 124 (8th Cir. 1970), cert. denied, 400 U.S. 996 (1971).

at 783. For the same reason, a formal violation of the prophylactic requirements of *Boykin* should not be regarded as the kind of error that can be raised when a prior conviction is used for enhancement purposes in a subsequent prosecution, particularly where, as here, the defendant is attempting to apply *Boykin*'s prophylactic protections in the context of a stipulated facts trial rather than a guilty plea. Compare *Boykin* v. *Alabama,* 395 U.S. at 242 (finding it significant that "a plea of guilty is more than an admission of conduct; it is a conviction"). The court of appeals therefore properly refused to recognize a constitutional right for petitioner to challenge his prior convictions on either of the grounds he raised at sentencing in the district court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

JOSEPH C. WYDERKO
Attorney

JANUARY 1994

☆ U.S. GOVERNMENT PRINTING OFFICE: 1993—301-157/86079